IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RUSSELL DAVID BARTLOW,

Defendant.
_____/

No. CR 98-0410 MMC

ORDER DENYING MOTION FOR REDUCTION OF TERM OF IMPRISONMENT

(Docket No. 56)

Before the Court is defendant Russell David Bartlow's motion, filed August 29, 2005 ("Motion"), by which said defendant seeks a reduction of his term of imprisonment pursuant to 18 U.S.C. § 3582(c)(2).

On September 28, 1999, defendant was sentenced to a term of 228 months in federal prison, based on his pleas of guilty to three counts of armed bank robbery (18 U.S.C. § 2113(a)(d)), alleged to have been committed on three separate dates, as well as to one count of using a firearm in the commission of the first of said robberies (18 U.S.C. § 924(c)(1)).

Pursuant to 18 U.S.C. § 3582, a district court may modify a term of imprisonment where, inter alia, the defendant was sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." See 18 U.S.C. § 3582(c)(2). Relying on Amendment 599 to the United States Sentencing Guidelines ("USSG"), defendant argues the Sentencing Commission, in November 2000, amended or clarified USSG § 2K2.4 to prohibit "double counting" in connection with convictions

under 18 U.S.C. § 924(c). Defendant contends the calculation of his guideline range involved such "double counting" and, consequently, that he is entitled to seek a reduction of his term based on the Sentencing Commission's subsequent action.

At the outset, the Court notes that defendant's plea agreement expressly precludes his pursuing a "post-conviction collateral attack" on the judgment, other than a collateral attack "based on a claim of ineffective assistance of counsel." (See Motion Ex. A.) Because a motion under § 3582(c)(2) does not challenge the validity of the sentence at the time it was imposed, the Court will assume, for purposes of this discussion, that the instant motion, to the extent it can be brought under § 3582(c)(2), does not constitute a "collateral attack" as contemplated by the parties to the plea agreement.

Amendment 599 is of no assistance to defendant, however, as that amendment has no bearing on what defendant herein characterizes as "double counting," specifically, the Court's[1] use of an armed robbery conviction to determine his offense level under the Career Offender Guideline, § 4B1.1, while at the same time imposing a five -year consecutive term as mandated by 18 U.S.C. § 924(c)(1). No "explosive or weapon enhancement" was applied in connection with defendant's sentencing. See, e.g., USSG § 2D1.1(b)(1) (providing for two-level enhancement if dangerous weapon possessed in commission of crime); United States v. Aquino, 242 F.3d 859, 863-65 (9th Cir. 2001) (noting purpose of Amendment 599 was to make clear courts could not apply "any explosive or weapon enhancement" where same behavior qualified as relevant conduct under § 1B1.3). Rather, as noted, defendant's sentence was calculated in accordance with § 4B1.1, precisely what
§ 2K2.4 currently requires. See USSG § 2K2.4(c) ("If the defendant (1) was convicted of violating section 924(c) . . . and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under § 4B1.1

[1]At the time of sentencing, the case was before the Honorable Charles A. Legge. On August 30, 2005, the case was reassigned to the undersigned.

(Career Offender), the guideline sentence shall be determined under § 4B1.1(c).").[2] Notably, the case on which the Court relied in calculating defendant's sentence, United States v. Harrington, 923 F.2d. 1371, 1376 (9th Cir. 1991), has not been overruled, and there are no changes to § 2K2.4 or § 4B1.1 since the time of defendant's sentencing that would serve to reduce the sentence defendant received.

Lastly, defendant seeks a reduction under United States v. Booker, 125 S. Ct. 738 (2005). To the extent the instant motion is based on Booker, however, such motion constitutes a collateral attack, as Booker concerns the constitutionality of a defendant's sentence at the time it was imposed. As noted, defendant is precluded by his plea agreement from bringing a "collateral attack." Defendant cannot avoid the strictures of his plea agreement by the simple expedient of bringing his challenge under 18 U.S.C. § 3582 rather than under 28 U.S.C. § 2255. Moreover, even in the absence of a plea agreement, Booker is of no avail to defendant. See United States v. Cruz, 423 F.3d 1119 (9th Cir. 2005) (holding Booker does not apply retroactively to cases on collateral review where conviction became final prior to date on which Booker issued).

Accordingly, the Motion is hereby DENIED.

This order terminates Docket No. 56.

IT IS SO ORDERED.

Dated: December 2, 2005

MAXINE M. CHESNEY
United States District Judge

[2]Because the Court cannot disregard the statutory mandate under 18 U.S.C. § 924(c), defendant, in essence, is asking the Court, in applying USSG § 4B1.1(c), to disregard the offense for which he was convicted.